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Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-1302 and 74-1316
Consolidated

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellants,

vs.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellees.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellants,

vs.

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Kentucky

CONSOLIDATED BRIEF FOR TURNER ELKHORN MINING COMPANY, et al.

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OPINION BELOW

The opinion of the district court is reported at 385 F. Supp. 424; it is printed in the Jurisdictional Statement in Case No. 74-1302 at Appendix A, pp. 1A-13A, and in the Jurisdictional Statement in Case No. 74-1316 at Appendix B, pp. 1b-13b.

JURISDICTION

The judgment of the district court was entered on November 20, 1974 (J.S. No. 74-1302, App. B, pp. 14A-15A).

The appellants in No. 74-1302 filed a motion to amend the judgment (J.S. No. 74-1302, App. C, pp. 16A-17A) on December 2, 1974, which was denied on December 19, 1974 (J.S. No. 74-1302, App. E, pp. 29A-30A). They filed their notice of appeal to this Court on January 16, 1975 (J.S. No. 74-1302, App. F, p. 31A). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 16, 1975, and it was docketed on that date.

The appellants in No. 74-1316 filed notice of appeal to this Court from Paragraph (3), of the judgment of the district court on January 20, 1975 (J.S. No. 74-1316, App. C, pp. 1c-3c). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 19, 1975. Appellants docketed the appeal on April 18, 1975.

This Court noted probable jurisdiction in each of these cases on June 9, 1975, and consolidated them for review (App. 46). The jurisdiction of this Court in each of the cases is conferred by 28 U.S.C. Sections 1252 and 1253.

QUESTIONS PRESENTED

1. Do the provisions of the Coal Mine Health and Safety Act requiring individual coal mine operators to pay benefits to their former employees, or their survivors, in connection with occupational disease incurred prior to enactment of the law constitute an arbitrary and irrational legislative means for providing economic relief to financially distressed inactive miners and their families, in violation of rights guaranteed mine operators by the Due Process Clause of the Fifth Amendment to the Constitution?

2. Has Congress violated rights guaranteed mine operators under the Due Process Clause of the Fifth Amendment to the Constitution by imposing upon them a statutory scheme of compensation for total disability due to occupational disease which, by virtue of the arbitrary, over-inclusive legislative presumptions and eligibility criteria incorporated therein, will require mine operators to pay benefits to:

   a) claimants who in fact are disabled by nonwork-related diseases, rather than work-related coal worker's pneumoconiosis; and

   b) claimants whose disease may or may not be work-related but who, in any event, are not in fact totally disabled by the disease at all?

Should the district court have given the plaintiff mine operators a full opportunity to prove at a trial that the statute does operate in such an arbitrary and over-inclusive fashion?

3. Was the district court correct in concluding that the irrebuttable presumption of total disability due to occupational disease set up in Section 411(c)(3); 30 USC §921 (c)(3) of the Act is unconstitutionally arbitrary because it forecloses any fact finding as to the actual disabling effect of the disease on a particular claimant, contrary to the clear intent of the Act that the existence of the disease and disability therefrom are two separate factors which must be independently established before liability may be imposed?

4. Was the district court correct in concluding that it was unconstitutionally arbitrary for Congress to decree, as it has in Section 411(c); 30 USC §921(c) of the Act, that a so-called "rebuttable" presumption of total disability due to occupational disease may only be rebutted by proof that the claimant does not have the disease at all, or did not contract it in his employment—rather than by proof that he is not actually disabled by it?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution, which provides in relevant part:

   no person shall • • • be deprived of life, liberty, or property, without due process of law; • • •

2. Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the relevant provisions of which are appended to this Brief at pp. 1a-9a.

STATEMENT OF THE CASE

Introduction

These appeals arise out of a suit brought by 22 coal mine operators[1] to enjoin the implementation and enforcement of Title IV of provisions of the federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 USC §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, imposing liability on mine operators for the payment of benefits to former and present mine workers and their families, ostensibly in connection with total disability occasioned by a single occupational disease known as coal workers' pneumoconiosis.[2]

The law in question establishes a system of economic relief of enormous scope for former coal mining employees that is completely without precedent or parallel in federal or state legislation. It represents a unique congressional experiment in the use of workmen's compensation mechanisms as a means to achieve legislative ends which plaintiffs contend are alien to the limited purposes such laws rationally can serve. The employer liability provisions of the Act are unique in two respects: they are used as a ve-

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1 Appellees in No. 74-1302, appellants in No. 74-1316; for clarity hereinafter referred to as "plaintiffs." The court below granted in part and denied in part the relief sought. On these cross-appeals, the parties have agreed to combine their arguments on the merits in each case in single briefs.

2 Coal workers' pneumoconiosis is a physiological condition resulting from inhalation of coal dust, which in its advanced stages may cause physical disability and death. Development of this condition to its disabling stage is a function of the concentrations of coal dust to which a mine worker is exposed and the duration of that exposure. See discussion at pp. 46-48, *infra*.

hicle for providing economic relief in the nature of reparations to persons who had left the work force prior to enactment of the law, and the eligibility for benefits of former and present employees is dictated substantially by statutory presumptions and other eligibility criteria governing the determination of disability due to occupational disease which make the law over-inclusive and lend it the character of a pension law, not a workmen's compensation law.

Legislative History of the Act

As first proposed in 1969, the disability benefits provisions of the Coal Mine Health and Safety Act were intended to create a modest and temporary program of federally financed emergency relief for aging and ill inactive mine workers and their families. Provisions imposing liability upon mine operators for payment of benefits were added to the Act only two days prior to its enactment, and virtually without congressional deliberation. The final version of the Act (S. 2917) had been drafted by a House-Senate Conference Committee as a compromise between the conflicting versions previously passed by the Senate (S. 2917) and the House (H.R. 13950), neither of which provided for payment of benefits by mine operators.[3]

As originally reported by the Senate Committee on Labor and Public Welfare on September 17, 1969, Senate Bill 2917 contained no provision for payment of black lung benefits to disabled miners in any form. The bill dealt only with health and safety conditions in mines.[4]

---

3 House Comm. on Education and Labor, 91st Cong., 2d Sess., *Legislative History/Federal Coal Mine Health and Safety Act* 963 ff. (Comm. Print 1970) (Hereinafter cited as "*1969 Legislative History*").

4 *1969 Legislative History* 1 ff.

Subsequently the bill was amended to provide for the payment of interim emergency benefits to coal miners (or their children and widows) who had become totally disabled and unable to work (or had died), prior to the effective date of the Act, from complicated pneumoconiosis arising out of mining employment. Benefits were to be paid only through fiscal year 1973, in part out of federal funds and in part through a system of matching grants to the states. The amendment contained an appropriation of 70 million dollars to fund the program for 3½ years.[5]

Statements in floor debate made by the sponsors of this amendment leave no doubt that it was intended to be a program of temporary economic relief for inactive miners which was to be financed by federal funds as a matter of national obligation, rather than by the mining industry.

In debate on September 26, 1969, Senator Byrd of West Virginia said:

> I just want to urge the manager of the bill at this time to devote every effort possible over the weekend to work out some program whereby these old and disabled miners, who have contracted this disease, perhaps 5, 10, or 15 years ago, and who have been in forced retirement for all these years but who have not qualified under State statutes for disability payments, can be given assistance through some Federal-State program.
>
> I personally would urge that the cost of such a program be borne initially by the Federal Government. I hesitate to think that we would have to load an additional expense on the management of the mines at this time when overhead costs are already very high and at a time when it is difficult for the product to remain competitive in the marketplace.

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5 *1969 Legislative History* 334-49.

I want to express the hope that we might devise some way for the Federal Government, along with the States, over a period of years, to shoulder the burden of the cost so that the mine management would not have to carry this additional burden.

But I strongly believe that out of fairness to the miners, and to the wives and widows of miners who have lost their lives through the contracting of pulmonary diseases from the inhalation of silica and coal dust, we in Congress have a responsibility to work out some program whereby disabled miners would be given help when they are not eligible under State workmen's compensation programs. Many of them cannot qualify under State statutes which are not retroactive, and yet they do need assistance. I would like to see them get assistance so they would not have to be on welfare programs, so that they could have some steady income, and so that they might be able to provide for themselves and their families.[6]

In introducing the amendment on September 30th, Senator Williams of New Jersey said:

> I am gravely concerned about a problem, not now covered by S. 2917, which I believe needs attention by the Congress, namely the problem of providing some means of protection to the miner and his dependents we have forgotten—the inactive coal miner who is totally disabled and unable to work because he contracted pneumoconiosis or black lung while working in the coal mines.
>
> • • •
>
> It is estimated by the Public Health Service that about 9 percent of the number of nonworking miners in this country are suffering from complicated pneumoconiosis. Yet, in many cases, these former miners and their dependents are not eligible for compensation

[6] *Id.* at 256-57.

> payments under State laws. At present, only seven States, West Virginia, Pennsylvania, Colorado, Alabama, Virginia, Tennessee, New Mexico, and Ohio provide any benefits for persons afflicted with this disease. In most cases, the State programs do not cover former miners or widows of miners or only provide minimal benefits for those people.[7]

Senator Javits of New York, speaking in support of the amendment, particularly emphasized his belief that providing such relief was a moral obligation of the nation as a whole:

> In S. 2917, the Committee on Labor and Public Welfare has reported out a measure which we on the committee believe will end this deathly scourge once and for all. But we have done nothing to help those who have already fallen prey to black lung—to those who might not have been disabled and forced to spend the rest of their lives as vegetables had we only seen our duty and done it sooner.
>
> I say "our duty" advisedly. For the root of the problem is the utter failure of all of us, and that includes the industry, the medical profession, and the Government—particularly the Public Health Service—to recognize this disease before being embarrassed into doing so—at least 20 years late, by Great Britain and other European countries.
>
> Our failure to recognize coal workers' pneumoconiosis as a separate disease has had two particularly insidious effects: First, it obviously precluded any attempts, through private efforts or legislation, to control coal dust, and second, it operated to prevent many miners from black lung [sic] from obtaining even minimally decent workmen's compensation. As a result, the thousands of inactive miners disabled by black lung

[7] *1969 Legislative History* 328.

are not only condemned to life as virtual invalids, they must also live out that life in abject poverty.

• • •

I emphasize, Mr. President, that the entire Nation shares the responsibility for this tragic situation; witness after witness who testified on this bill stressed America's complete insensitivity to the problem of black lung until very recently—it was not until the mid-1950's that black lung was recognized by responsible medical authorities as a disease. Britain, on the other hand, began to recognize the disease in 1934, and it became compensable in 1943. In the United States, until last year, only three States recognized black lung as a compensable disease; in other States the only way miners could receive compensation is if they could convince examining boards they had silicosis, which usually was not possible.[8]

Senator Byrd, speaking on the same day said:

> Mr. President, I consider it a necessity that we pass legislation to provide disability benefits to miners suffering from pulmonary diseases, because in so many instances the State statutes, not being retroactive, do not reach the old disabled miner who long ago has been forced into retirement as a result of his having acquired black lung, pneumoconiosis, silicosis, or some other pulmonary disease through employment in the mines.[9]

H.R. 13950 did contain a provision for federally-financed benefits for total disability due to *complicated* pneumoconiosis when it was reported out of the House Committee on Education and Labor on October 13, 1969.[10] The Committee Report described the purpose of the benefits provision as follows:

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8 *1969 Legislative History* 338-39.

9 *Id.* at 346.

10 *1969 Legislative History* 933.

Subsection (b) provides payments to miners totally disabled from complicated pneumoconiosis and to the widows of miners who suffered from complicated pneumoconiosis at the time of death. The disease must have arisen out of or in the course of the individual's employment in a coal mine. If he was so employed for 10 years or more, there is a rebuttable presumption that the disease so arose; if he was not, the individual must demonstrate that his disease so arose.

• • •

Payments under this subsection are for retroactive cases only, and not for prospective cases.

• • •

These provisions of the bill are a limited response in the form of emergency assistance to the miners who suffer from, and the widows of those who have died with, complicated pneumoconiosis.

• • •

One of the compelling reasons the committee found it necessary to include this program in the bill was the failure of the States to assume compensation responsibilities for the miners covered by this program. State laws are generally remiss in providing compensation for individuals who suffer from an occupational disease as it is, and only one State—Pennsylvania—provides retroactive benefits to individuals disabled by pneumoconiosis.

Also, it is understandable that States which are not coal-producing have no wish to assume responsibility for residents who may have contracted the ailment mining coal in another State. The substantial reduction in the number of miners actually employed in mines following World War II caused a dispersal of men throughout the country—many into States which have few, if any, mines. These men took with them an irreversible disease, but because of their present location are denied benefits.

The committee also recognized the problems inherent in requiring employers to assume the cost of compensating individuals for occupational diseases contracted in years past.

The resolution of this dilemma, consistent with the desperate financial need of individuals eligible to receive payments under this bill, was the inevitable inclusion of section 112(b), and the requirement that the payments be made from general revenues.

It is hoped that the health standards prescribed in title II will eliminate conditions in mines which cause the disease. Also, it is expected that the States will assume responsibility in their respective compensation plans for miners who contract the disease in the future.[11]

The reasons underlying the Committee's decision to provide for payment of benefits out of federal funds were described in greater detail by Representatives Perkins of Kentucky, Dent of Pennsylvania and Daniels of New Jersey in Floor debate on October 27.

Representative Perkins:

> Existing State compensation laws are in most instances inadequate to meet the real needs of miners disabled by black lung. Even where compensation payments are made, they are frequently below the minimum subsistence level, or miners disabled by the disease are ineligible on the basis of some technicality. For example, they may have worked in a State other than that in which they reside when the disease catches up to them, or the number of employers they worked for makes it difficult to assign the costs of compensation to those who might be held legally responsible for the disability.

11 *1969 Legislative History* 569-71.

> One thing is clear, however. The coal produced by these victims of black lung was sold throughout the United States at prices lower than it could have been if compensation costs had been paid at the time that the disability was incurred. Consequently, compensation for past damage to a coal miner's health can, we believe, logically be considered a national responsibility. The bill provides for payments to miners where the State does not assume responsibility or where the payments are inadequate.[12]

Representative Dent:

> The committee also recognizes the possible inequities inherent in requiring employers to assume the costs of compensating individuals for occupational diseases contracted in years past.
>
> Many miners have worked in more than one coal mine and for more than one employer. Who can determine precisely when that miner contracted pneumoconiosis and for whom he was working?
>
> The resolution of this dilemma, consistent with the desperate financial need of individuals eligible to receive payments under this bill, was the inevitable inclusion of section 112(b), and the requirement that the payments be made from general revenues.
>
> • • •
>
> The miners for whom this program is intended became victims of pneumoconiosis many years ago. They were mining coal for national consumption, and for an industry under intense Federal pressure to keep the cost of the fuel low. The entire Nation benefited from the use of coal and its low cost. The entire Nation then, has an obligation to the miners who became the unfortunate recipients of an insidious disease in the process, and to their widows and minor children.[13]

12 *Id.* at 654.

13 *1969 Legislative History* 719-20.

Representative Daniels:

> This Nation's failure to take cognizance of coal miners' pneumoconiosis as a separate clinical study some 20 years after this dreaded disease was recognized by Great Britain and other European countries has had five particularly unfortunate results:
>
> First, it precluded attempts by private enterprise to control coal dust in the mines in order to prevent the effects of this insidious disease.
>
> Second, it caused States to neglect the problem when it was in its inception and the cost of prevention could still be economically borne by State governments or private enterprise.
>
> Third, it operated to prevent disabled coal miners from obtaining workmen's compensation, proper medical care, and other remedial action. Thus, many thousands of miners have died before their claims were processed or the statute of limitations expired which prevented many miners from proving their claims in time to receive benefits.
>
> Fourth, it is economically impossible for most States to provide funds for retroactive claims.
>
> Fifth, it is unconstitutional to make private employers pay these claims.
>
> Therefore, section 112(b) is an attempt to do something about a situation which was created to a major extent by Federal neglect.[14]

On October 27th the House passed H.R. 13950, and amended S. 2917 to substitute the text of H.R. 13950 for that drafted and passed in the Senate, and the two versions of S. 2917 were sent to Conference Committee for reconciliation.

---

14 *Id.* at 815.

On December 16, 1969, the Conference Committee reported out a substitute bill that differed in major respects from either the House or Senate versions—especially with regard to disability benefits, where, among other things, Part C governing mine operator liability for benefits was added. The Conference Committee Report noted the new employer liability provision but gave no reason for the change.

The House passed the Conference Bill on December 17, 1969, the Senate passed it a day later, and it was signed into law on December 30, 1969.

The Disability Benefits Programs Created by the Act.

The workmen's compensation scheme devised and adopted in the closing days of 1969 (and amended in 1972) is set out in Title IV of the Act, which consists of three parts: Part A (§§401, 402; 30 USC §§901, 902) contains a general statement of the purpose of the title, and defines certain terms used in the title. Part B (§§411-414; 30 USC §§921-924) creates a program for the processing and payment out of federal revenues of claims for black lung benefits filed on or before December 31, 1973, and Part C (§§ 421-424; 30 USC §§931-934) creates a program under which mine operators are responsible for the payment of benefits after December 31, 1973.

According to the congressional declaration, Title IV was designed to achieve two purposes:

> "Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or

who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis."[15]

It is important to note that the two benefits programs created by Title IV do not coincide with the two separate purposes the title was designed to serve. That is, the federally-financed Part B was not intended to, nor did it function to provide benefits in all cases of black lung disability or death that had arisen prior to enactment of the law, and the operator-funded Part C was not intended to, and in operation will not be limited to miners now actively employed in mining activities who may become eligible in the future. The distinction between the two benefits programs primarily is chronological.

The benefits program created by Part B of the Act is administered by the Secretary of the Department of Health, Education and Welfare through the Social Security Administration.

Section 411; 30 USC §921 directs the Secretary to "make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or

15 Act, section 401; 30 USC §901.

who at the time of his death was totally disabled by pneumoconiosis", and sets out certain presumptions concerning the existence of the disease and its causation which the Secretary is required to apply in determining a claimant's entitlement to benefits. Paragraph (c) of Section 411 provides that:

> (c) For purposes of this section—
>
> (1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;
>
> (2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;
>
> (3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disable due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and
>
> (4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection

> with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. • • •

While these presumptions are termed "rebuttable" in the Act, in reality there is no way to rebut them in the vast majority of cases except through the use of x-ray evidence (see discussion at pp. 48-55, *infra*); the Act, however, expressly forbids the denial of a claim solely on the basis that x-ray evidence fails to show the presence of the disease. Section 413(b); 30 USC §923(b). Disproof of the presumption of total disability erected in subparagraph (4) of Section 411(c) is rendered even more difficult by the additional proviso that it may be rebutted ". . . only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

Section 412; 30 USC §922 of the Act provides for the payment of lifetime benefits to miners and former miners whom the Secretary of HEW finds to be "totally disabled" —as that term is defined in the Act—due to pneumoconiosis, and to the widows of miners and former miners whom the Secretary finds to have died of pneumoconiosis, or who were receiving benefits at the time of their death. In addition, benefits are payable under Section 412 to the dependent children, or parents, or brothers and sisters of miners and

former miners whom the Secretary finds died of pneumoconiosis, or were "totally disabled" by such disease at the time of death, or were receiving benefits at the time of death, and to the children of widows who die while receiving benefits. Benefits on claims filed under Part B before July 1, 1973 are payable for as long as the recipient remains eligible.

Part C of the Act was designed to handle only those claims filed after the termination of the Part B program and before December 31, 1981[16] by persons who are not entitled to benefits under the workmen's compensation law of a state formally recognized by the Secretary of Labor as affording coverage equivalent in scope to that of the federal law. Section 421(a); 30 USC §931(a) of Part C provides that:

> On and after January 1, 1974 any claim for benefits for death or total disability due to pneucomoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconio-

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16 Section 422(e); 30 USC §932(e) provides that "no payment of benefits shall be required under this section: . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after the date of enactment of this Act." While it would appear that the language of subparagraph (3) requires that all *benefit payments* terminate in 1981, the Secretary of Labor interprets the language to mean that no new *claims* will be considered after that date, but benefits awarded on claims filed prior to that date will be payable for the life-time of the recipient or recipients. Legislative history does not resolve the ambiguity in this language.

sis they shall be entitled to claim benefits under this part.[17]

No State's compensation law yet has qualified for such official recognition by the Secretary of Labor, and there is little prospect that any state will so qualify. Part C, therefore, constitutes, for all practical purposes, a single-disease, single-industry, retroactive, federal workmen's compensation statute.[18]

The categories of persons eligible for benefits under Part C are the same as those described in Section 412(a); 30 USC §922(a) as eligible under Part B—that is, miners and former miners, their widows, or their surviving dependent children, or parents, or brothers and sisters.[19] As under Part B, claimants may be found eligible for benefits even if the disability or death upon which the claim is based occurred before enactment of the law, and even if the miner was not employed in mining at the time.[20]

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17 Claims filed during the period July 1, 1973 to December 31, 1973 are processed jointly by the Secretaries of HEW and the Department of Labor pursuant to the provisions of sections 414, 415; 30 USC §§924, 925.

18 Section 422(a); 30 USC §932(a) provides that coal mine operators' liability for benefits shall be governed, with certain exceptions, by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, modified as the Secretary of Labor deems appropriate to implement the provisions of Part C.

19 Act, Section 422(c); 30 USC §932(c).

20 Section 422(f)(1); 30 USC §932(f)(1) does contain a statute of limitations requiring that Part C claims filed within three years of "discovery" of disability or of the date of death, but that limitation is illusory in the case of a living miner's claim, because under the definitions, standards and presumptions of this law, breathing impairments common to the aging non-mining population which are not *medically* identifiable as coal workers' pneumoconiosis, and not in fact totally disabling would be *legally*

(footnote continued on following page)

The definitions, standards and presumptions (including the limitation on negative x-ray evidence) governing the determination of whether a miner has or had pneumoconiosis and is or was "totally disabled" by it, also govern such determinations under Part C.[21]

One of the major differences between the Part B and Part C programs is that the amount of benefits for which a mine operator may be liable under Part C is greater than that which the government is responsible for paying under Part B, because Part C benefits include life-time medical expenses incurred by a recipient in connection with his disease;[22] there is no such provision in Part B.

A coal mine operator is liable under Part C for the payment of benefits in connection with the disability or death

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considered to be both for purposes of awarding benefits. See discussion at pp. 48-59, *infra*. The resulting tendency of the law to award benefits to persons with respiratory ailments of any nature simply because they have a mine work history is one of the principal points of contention in this suit.

21 Act, Sections 421(b)(2)(C), 422(h), 430; 30 USC §§931(b)(2)(C), 932(h), 940. The only exception is that claims based upon the 15-year presumption created in Section 411(c)(4) of Part B must be filed within three years of last exposed employment (in the case of a living miner), or 15 years of last exposure (in the case of death), Section 422(f)(2); 30 USC §932(f)(2), and the 15 years of employment referred to in the presumption must have occurred prior to July 1, 1971. Section 430; 30 USC §940.

22 The medical benefits provisions of Section 7 of the Longshoremen's and Harbor Workers' Act are incorporated into Part C by reference in Section 422(a); 30 USC §932(a). In fact, the Secretary of Labor has taken the position that mine operators are liable to pay the medical expenses of persons already receiving Part B benefits where the qualifying employment relationship is present. See 20 CFR §§720.109(a), 725.102(a). Plaintiffs challenged the Secretary's authority to promulgate these regulations in their complaint (Appendix p. 23); the district court has reserved judgment on the issue (J.S., No. 74-1302, App. A, p. 2A).

of his present and former employees from pneumoconiosis if the Secretary of Labor finds that the pneumoconiosis arose, at least in part, out of employment by such operator.[23] Operators are also made liable for the payment of benefits to the former employees of any mine they have acquired since December 30, 1969.[24]

All operators are required to secure their liability for benefits through private insurance, self-insurance, or participation in a state fund. If an operator fails to secure his liability or pay benefits, the Secretary of Labor is required to pay them, and the operator becomes liable to the United States in a civil action for the amount paid. The Secretary of Labor must also pay benefits to a claimant when there is no operator found who can be held responsible under the law.[25]

Economic Scope and Impact of the Benefits Programs

Immediately prior to the original enactment of the Coal Mine Health and Safety Act in 1969, congressional proponents of the Black Lung Benefits title of the Act estimated that there were approximately 50,000 retired and disabled miners and 3,300 active miners who could qualify for benefits upon enactment, and that the cost of the program could be no more than $120 million per year.[26]

By the end of the second year of the program, 350,000 claims had been filed, 159,500 had been allowed (33,100

23 Act, Section 422(c), (h); 30 USC §932(c), (h).

24 Act, Section 422(i); 30 USC §932(i). The prior operator also remains liable.

25 Act, Sections 423, 424; 30 USC §§933, 934.

26 *1969 Legislative History* 1114, 1078, 1148.

miners and 71,400 widows) and 25,000 were pending. Over $532 million had been paid out since the beginning of the program and recurring monthly payments had reached $28 million.[27]

In May of 1972, Title IV was amended to extend by 18 months the time within which claims for federal life-time benefits could be filed, the claimant's burden of proving his claim was eased by adoption of a liberalized definition of total disability, medical proof requirements were drastically relaxed, surface miners were brought within the Title, additional dependents and survivors were made eligible, and the Social Security Administration was ordered to reconsider most of the claims it previously had denied on the basis of the stricter eligibility criteria.[28]

At the close of the Part B program on June 30, 1973, some 550,000 applications for benefits had been filed with the Social Security Administration; as of December 31, 1974, $3.2 billion had been paid to over 500,000 beneficiaries, and continuing payments are being made at the rate $1 billion annually.[29]

The Department of Labor began entertaining claims for which mine operators could be held liable under the Part

27 U.S. Dep't of Health, Education & Welfare, *Second Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969* p. 9 (Soc. Sec. Pub. No. 80-72, 1973).

28 Certain of these amendments, contained in the Black Lung Benefits Act of 1972, and their unconstitutionality as applied to mine operators through Part C of Title IV are discussed at pp. 48-59, *infra*.

29 House Comm. on Education and Labor, Subcomm. on Labor Standards, 94th Cong. 1st Sess., *Hearings on H.R. 7, H.R. 8, H.R. 3333* ("*Black Lung Benefits Reform Act of 1975*") pp. 215, 219. (Social Security Administration testimony). Hereinafter cited as *1975 House Hearings*.

C program on July 1, 1973. By mid-February of 1975, approximately 60,000 applications had been filed.[30] Statistics compiled by the Staff of the House Committee on Ways and Means in 1974 indicate that roughly 60% or more of applications under the Part B program were filed by living miners, and the remainder by survivors.[31] The percentage of applications filed by living miners under Part C is much greater. [32] To put these claims figures in perspective: according to testimony given before the House Subcommittee on Labor Standards by the American Insurance Association in February of 1975, there were only 153,000 persons working as coal miners in the United States as of November, 1974; in 1939 there were 454,000 active coal miners.[33] There were only 6,651 cases of compensable death or permanent total disability resulting from other insured work injuries or diseases in the entire nation in 1973.[34]

Even though claims under the Part C program are subject to certain limitations on filing and adjudication to

30 *1975 House Hearings* 123 (Department of Labor testimony). According to this testimony, initial eligibility determinations had been made in approximately 34% of the cases, of which approximately 22% were favorable to the claimant.

31 House Comm. on Ways and Means, *Committee Staff Report on the Disability Insurance Program* p. 414, Table 110 (July 1974).

32 U.S. Dept. of Labor, *First Annual Report on Administration of the Black Lung Benefits Program of the Coal Mine Health and Safety Act*, p. 10 (May 30, 1975).

33 *1975 House Hearings* 14.

34 *Id.* at 15.

which Part B claims are not subject,[35] under Part C mine operators will be liable to broader categories of claimants, and in higher benefit amounts. Under Part C, operators not only must pay benefits similar to those payable on Part B claims, they are also liable for the payment of medical benefits to disabled miners. Under the Secretary of Labor's interpretation of the Act, such medical benefits are available not only to miners filing for the first time after July 1, 1973, but to all miners now receiving Part B federal benefits who refile and qualify. It has been conservatively estimated that the value of a Part B claim averages some $80,000, and that the medical benefits provided under Part C add another $21,600 to that value,[36] making a mine operator's potential exposure per claim some $91,600.

The cost of insuring against this liability promises to be extraordinarily burdensome for coal mine operators. Plaintiffs submitted in the district court the affidavit of an expert insurance actuary who estimated an industry exposure of almost $280 million annually from presently employed miners alone, and a $2 billion exposure for payment of medical benefits to former miners.[37] By way of comparison, total compensation paid through the workmen's compensation system in the entire nation in 1970 amounted to $3 billion, which included medical services, cash benefits for total and partial disability, benefits to

35 Claims must be filed within three years of discovery of total disability, or of death, and the 15-year presumption does not apply to years after 1972. See discussion at pp. 21-22, *supra*. Also some claims filed under Part C will be payable by the federal government because no responsible operator can be found.

36 Deposition of George F. Reall, National Counsel on Compensation Insurance, p. 54, filed in the district court on February 25, 1974.

37 Affidavit of J. Huell Briscoe, Appendix p. 34.

survivors, and burial allowances. Medical benefits accounted for $1 billion of the total.[38] According to testimony taken on deposition in the proceedings below, the authoritative National Council on Compensation Insurance was etablishing occupational disease rates in many states in the area of $25 per one hundred dollars of payroll for deep mines, which represents in most cases some one-half to three-quarters of the total compensation rate paid by mine operators.[39] Again, by way of comparison, in 1971 compensation rates nationwide averaged only from 10 cents per one hundred dollars payroll for insurance companies, to $2.00 per one hundred dollars payroll for primary metals industries.[40]

A 1973 study of the potential impact of the black lung program on the mining industry of Kentucky, were that state to adopt the federal plan, estimates that compensation insurance rates could reach over $43 per hundred dollars payroll for large mines, and over $60 per hundred dollars payroll for small mines by 1973, and that if other Kentucky industry should cease to share the compensation burden as it now does, rates could reach approximately $139 and $194 per hundred dollars payroll for large and small mines, respectively. [41]

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38 National Comm'n on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation*, 31, 145 (1973).

39 Reall Deposition, Note 36 *supra*, Exhibit A.

40 U.S. Chamber of Commerce, *Employee Benefits 1971* Table 6 (1972).

41 Univ. of Kentucky College of Business and Economics, *Projected Direct Impact of Black Lung Program on Kentucky With Emphasis on the Kentucky Coal Industry: A Preliminary Report* 8-9 (July 1973) (A copy of this document appears as Item No. 2 in the separately-bound appendix filed in the district court in conjunction with plaintiffs' memorandum of law in support of their motion for summary judgment, and is included in the record on appeal.)

The Decision of the Three-Judge District Court Below

Plaintiffs filed suit to enjoin the implementation and enforcement of Part C of Title IV of the Act in August of 1973. They charged in their Complaint (Appendix pp. 11-25) that the imposition of liability on them to pay benefits to former employees or their survivors in connection with occupational disease incurred prior to enactment of the law violated their rights to due process and equal protection of law; that the period-of-employment presumptions set out in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC §921(c) were unconstitutionally arbitrary and and irrational bases upon which to predicate coal mine operators' liability to pay benefits; that the regulations promulgated by the Secretary of Labor governing the determination of the particular employer to be held liable on a particular claim embodied arbitrary and irrational irrebuttable presumptions which violated the employer's right to due process of law; and, that the regulations of the Department of Labor imposing liability on coal mine operators to pay medical benefits to claimants already receiving federally financed indemnity benefits under the Part B program were not authorized by the Act.

In February, 1974, plaintiffs filed a motion for summary judgment (Appendix pp. 29-38) supported by answers to interrogatories, responses to requests for admission of facts, depositions, affidavits of a medical expert and an actuarial expert, and documents produced by the Labor Department. The defendants moved to strike all of the evidence submitted by plaintiffs in support of their summary judgment motion, and filed, in addition, a motion to dismiss the action, and a cross-motion for summary judgment. (Appendix pp. 39-45).

In its decision of November 19, 1974, the three-judge district court ruled as to plaintiffs' first claim, that ". . . the decision of Congress to impose [liability on operators] on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution." (J.S. No. 74-1302 App. A, p. 6A). The court also upheld the constitutionality of the period-of-employment presumptions in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC, §921(c), apparently on the grounds that the presumptions were rational and capable of being rebutted. (J.S. No. 74-1302 App. A, pp.8A-9A). The Court did, however, find the presumption governing determination of total disability set out in Clause (3) of Section 411(c), 30 USC §921(c), and the limitation of rebuttal evidence in the last sentence of Clause (4) of Section 411(c), 30 USC §921(c), violative of mine operators' rights under the Due Process Clause of the Fifth Amendment (J.S. No. 74-1302 App. A, pp.9A-12A), and enjoined the Secretary of Labor from applying them. (J.S. No. 74-1302 App. B, p15A).

The three-judge court held that it had no jurisdiction to consider the issues raised concerning the validity of the Secretary's regulations and remanded those issues, and any others remaining, for decision by the district judge who requested convocation of the three-judge panel. (J.S. No. 74-1302 App. A, p.2A; App. B, p.15A).

SUMMARY OF ARGUMENT

Part C of Title IV of the Coal Mine Health and Safety Act of 1969, as amended, is arbitrary, irrational and unfairly discriminatory legislation repugnant to coal mine

operators' rights to due process of law and equal protection of law under the Fifth Amendment to the Constitution.

1. The provisions of the Act imposing liability on mine operators to pay benefits to inactive miners who left the work force long before passage of the law constitute an unconstitutionally arbitrary and irrational legislative means for achieving the admittedly proper legislative goal of providing economic relief for such persons and their families. Singling out those members of the present mining industry who were the former employers of inactive miners to bear the burden of what Congress recognized to be a national obligation to this group of persons, can neither be justified as a workmen's compensation law, nor as a plan for exacting reparations for past wrongs not legally redressable at the time.

2. The eligibility of former and present coal mine employees for benefits under the Act is dictated substantially by statutory presumptions and other eligibility criteria governing the determination of disability due to occupational disease which render the law over-inclusive and lend it the characteristics of a pension law, not a workmen's compensation law. The law contains irrebuttable presumptions, and presumptions termed rebuttable which are not in fact fairly rebuttable, that result in the granting of benefits to persons who do not have an occupational disease or are not totally disabled by such a disease. Determining mine operator liability on the basis of these statutory presumptions violates their right to due process of law under the Fifth Amendment to the Constitution. The court below correctly recognized that to be so in the case of two of the presumptions erected in the statute, but erred in failing to consider plaintiffs' contention that certain other of the presumptions were not fairly rebuttable and resulted in a similar violation of their constitutional rights.

ARGUMENT

I.

THE OBLIGATION IMPOSED ON PLAINTIFFS BY TITLE IV TO PAY BENEFITS TO EX-MINERS OR THEIR SURVIVORS IS UNCONSTITUTIONALLY ARBITRARY AND IRRATIONAL.

The issue in this case is not whether it is permissible for Congress to create a program of financial relief for physically and economically disabled inactive coal miners and their families. Plaintiffs recognize that to be a legitimate object of the federal legislative power. The question before this Court is whether Congress chose an unconstitutionally arbitrary and unfair means to accomplish that end when it decided that particular mine operators were to bear the burden of financing this relief and that they were to be identified on the basis of their past employment relationships with individual claimants—many of which relationships terminated years, or even decades,[1] prior to passage of law.

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[1] For example, the Department of Labor has notified plaintiff Peabody Coal Company that initial determinations have been made that the company is responsible for paying benefits to two claimants who left mine work in the 1920's (M. Vinovich, SS# 322-20-1740, born 1898, left mines 1923; R. Horton SS# 432-10-4701, born 1903, left mines 1927), four claimants who left mining in 1930's (W. Watts, SS#332-01-7243, born 1904, left mines 1931; A. Libbey, SS# 354-10-9906, born 1899, left mines 1932; L. Francisco, SS# 348-07-6628, born 1881, left mines 1932; H. Pikey, SS# 342-03-2234, born 1912, left mines 1937), five claimants who left mining in the 1940's (O. Murer, SS# 306-03-8392, born 1910, left mines 1943; L. Williams, SS# 332-01-7748, born 1913, left mines 1946; J. Leach, SS# 332-01-9775, born 1881, left mines

(footnote continued on following page)

This Court has said that the Constitution's guarantee against arbitrary, irrational or unfairly discriminatory legislative acts, whether founded on principles of due process or equal protection of law, extends not only to legislative ends, but to the means by which those ends are achieved. See *James* v. *Strange*, 407 U.S. 128, 141 (1972); *Reed* v. *Reed*, 404 U.S. 71, 76 (1971); *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 413 (1935).[2] These principles are applicable to federal legislation through the Due Process Clause of the Fifth Amendment, *Weinberger* v. *Wiesenfeld*, ... U.S. ....., 95 S. Ct. 1225, 1228 fn.2 (1975); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). Recent decisions of this Court also suggest that the means by which legislative purposes are achieved should be made the subject of a meaningful judicial scrutiny when challenged as violative of these prin-

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1948; J. Nahas, SS# 344-03-4643, born 1900, left mines 1948; J. Villanucci, SS# 332-14-1872, born 1883, left mines 1948) and fourteen claimants who left mines in the 1950's (M. Arnold, SS# 509-05-5065, born 1909, left mines 1954; S. Ayers, SS# 401-01-3655, born 1905, left mines 1951; G. Sarver, SS# 342-03-5482, born 1905, left mines 1951; C. Campbell, SS# 327-18-4238, born 1904, left mines 1952; J. Warner, SS# 352-10-7201, born 1907, left mines 1952; C. Pennington, SS# 307-03-6192, born 1908, left mines 1953; V. Devos, SS# 343-10-9854, born 1909, left mines 1953; J. Kinder, SS# 233-24-4937, born 1921, left mines 1954; A. Smith, SS# 303-05-2658, born 1885, left mines 1954; L. Sennezy, SS# 344-03-6281, born 1889, left mines 1954; C. Purnell, SS# 355-09-2809, born 1911, left mines 1954; E. McCormick, SS# 322-01-5990, born 1894, left mines 1955; T. Hulsey, SS# 357-10-5001, born 1910, left mines 1956; E. Knuckles, SS# 401-24-9948, born 1922, left mines 1959).

[2] See generally, Gunther, *The Supreme Court/1971 Term/Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 23 (1972).

ciples, even though the legislation may not touch upon "fundamental" interests, or involve constitutionally "suspect" classifications. See *Stanton* v. *Stanton*, ... U.S. ....., 95 S.Ct. 1373, 1377 (1975); *Weinberger* v. *Wiesenfeld*, ... U.S. ....., 95 S. Ct. 1225 (1975); *James* v. *Strange*, 407 U.S. 128, 134, 141 (1972); *Reed* v. *Reed*, 404 U.S. 71, 76 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438, 448 (1972); *Weber* v. *Aetna Cas. & Surety Co.*, 406 U.S. 164, 170 (1972); *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632, 655 (1974) (concurring opinion of Mr. Justice Powell); *Frontiero* v. *Richardson*, 411 U.S. 677, 691 (1973) (concurring opinion of Mr. Justice Powell).[3]

Legislation that attaches new legal rights and duties to pre-enactment transactions, occurrences and conduct, as the legislation in question here does, long has been recognized as constitutionally suspect because of its great potential for violating the guarantee of fairness implicit in the Due

[3] In *James* v. *Strange*, for example, this Court found it unnecessary to consider whether a state statute allowing recoupment of counsel fees expended in an indigent's defense violated the fundamental constitutional right to counsel, and declared the law invalid on the basis that the classifications created did not bear a rational relationship to the admittedly legitimate purposes of the law. 407 U.S. at 134, 141, and in *Reed* v. *Reed*, this Court invalidated a classification based on sex as unrelated to the legislative purposes of a state law governing appointment of administrators of decedents' estates—without reference to "fundamental" interests, and recognizing that the object of the legislation had some legitimacy. 404 U.S. at 76. See also, *City of New York* v. *Richardson*, 473 F.2d 923, 930-31 (2d Cir. 1973); *Samuel* v. *University of Pittsburgh*, 375 F.Supp. 1119, 1132-34 (W.D. Pa. 1974); Gunther, Note 2 *supra* at 18-33.

Process Clauses of the Fifth and Fourteenth Amendments[4] and, consequently, plaintiffs submit, should be subjected to a scrutiny more careful than that demanded in the case of constitutional challenges to regulatory statutes not having that characteristic.

A proper examination of the relationship between the purposes of the legislation in question and the means devised by Congress to achieve those purposes would reveal the error of the district court's holding (J.S. No. 74-1302 App. A, p.6A) that the operator-liability provisions of Title IV represent a rational exercise of congressional powers. The constitutional vice of the black lung benefits law is that Congress has attempted to employ traditional workmen's compensation concepts and mechanisms to accomplish two very different ends: (1) to insure that men working in coal mines now and in the future will be compensated if they become disabled by coal workers' pneumoconiosis, and (2) to provide economic relief for large numbers of financially distressed ex-miners (and their families or survivors) who worked in coal mines in years past and did not have the benefit of workmen's compensation coverage of this nature. The first is an appropriate subject for compensation law, but the second is not.

[4] See generally: *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 350 (1935); *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1927); *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 554 (1949) (*dictum*); *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315-16 (1945) (*dictum*); *Mora* v. *Mejias*, 223 F. 2d 814, 816, 819 (1st Cir. 1955); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 221-225 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 782, 791 (1936).

The early legislative history of Title IV clearly reflects a congressional belief that economic aid should be provided out of federal revenues for aging and disabled inactive mine workers and their families as a matter of national moral obligation.[5] The workmen's compensation provisions imposing liability on mine operators were added to the law on the eve of its enactment, virtually without congressional deliberation, and encompassed inactive, former mine workers as well as those presently in the work force.[6] It appears that this change was motivated by a desire to reduce the federal costs the law would entail, and that this was achieved merely by designating a cut-off date after which mine operators would be responsible for the claims of inactive miners as well as active miners on the theory that "industry" should bear the costs of benefits for its workers.[7] It is of controlling importance in this case, however, to recognize that the class singled out by this legislation

5 See discussion at pp. 6-14, *supra*.

6 See discussion at pp. 14-15, *supra*.

7 Senator Javits of New York explained that he had initiated the addition of these provisions in committee on the ". . . principle that industry should bear the cost of benefits for its injured and diseased workers." *1969 Legislative History* 1149. Subsequently he explained in hearings on proposed amendments in 1971, that ". . . I personally fashioned this compromise on workmen's compensation, to answer the fears of many of my colleagues, not those in the coal mining States, but the others who had to vote for what now has turned out to be a rather substantial federal liability in cost, and I I calmed many of their fears by the terminal date concept. . . ." *Hearings on S. 2675, S. 2289, H.R. 9212, Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st & 2d Sess. 135-36 (1972).

Ironically, in many instances this legislative "means" does not serve the legislative "end" of providing significant economic relief to inactive miners at all. Some 90 percent of inactive miner-claimants also receive Social Security benefits, *HEW Second Annual Report* Table 7. If their Title IV benefits were federally-financed, their black lung benefits would be in addition to these benefits. Act, section 412(b). Operator-financed benefit payments, however, would be offset against Social Security benefits as workmen's compensation payments. See *Richardson* v. *Belcher*, 404 U.S. 78 (1971). To a great extent, therefore, Part C does not further the Act's goal of providing *additional* relief to inactive miners, it merely shifts the burden of relief already being received away from the government and onto mine operators.

(footnote continued on following page)

to bear its economic burdens is not the coal mining industry, but those mine operators within the industry who happen to be former employers of the inactive miners who file claims.

Plaintiffs submit that there are only two possible explanations for Congress' choice of former employers as the class to bear the burden of paying benefits to inactive miners: (1) Congress may have thought that requiring these employers to pay benefits to their inactive former employees was justified by the same considerations that justify the obligations employers owe active employees under conventional workmen's compensation statutes; or (2) Congress may have felt that placing this obligation on former employers was justified as a "reparations" measure—that is, present legal redress for conduct in the past that was not unlawful at the time, but in hindsight is deemed to have been socially or morally culpable.

A. Viewed as a workmen's compensation law, Part C is irrational, and arbitrarily discriminatory.

The philosophy underlying workmen's compensation laws is that economic losses suffered by workers as a result of disabling disease and injury incurred in connection with their labor should be borne by the consumers of the prod-

ucts whose production was the occasion for their losses. Workmen's compensation laws achieve this result by transferring the loss from the worker to his employer, who is better capable of passing the loss on to consumers through the price of the product, along with his other costs of production.[8]

In addition to protecting workers against interruption of income, one of the primary objectives of workmen's compensation is to protect workers against the work-related injuries and diseases that cause such losses. Shifting the initial incidence of these losses to employers as a cost of production brings market forces to bear on relative economic efficiencies, which provides a powerful incentive for an employer to protect his employees against occupational hazards, because producers facing higher costs and lower profits due to poor safety records are competitively disadvantaged.[9]

Insurance plays a crucial and indispensable role in workmen's compensation programs. It serves to secure the payment of benefits to employees and provides a route whereby the cost of the compensation system is passed on to the consuming public in orderly fashion.[10] Workmen's com-

8 See generally: 1 Larson's Workmen's Compensation Law §2.20; PROSSER, *Law of Torts* 530-31 (4th Ed. 1971). Riesenfeld, *Modern Social Legislation* 137-140 (1950); National Comm'n on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation* 21-25 (1973).

9 See *The Report of the National Commission on State Workmen's Compensation Laws* 38, 39, 87 (1972).

10 See generally, 1 Larson Note 8 *supra* at §2.70; 3 *id.* §§92 *et seq.*; Lenhoff, *Insurance Features of Workmen's Compensation Laws*, 29 Corn. L.Q. 176 (1943); Deposition of George F. Reall, National Council on Compensation Insurance, pp. 47-48, filed in the district court on February 25, 1974.

pensation insurance rates are established on the basis of estimates of the potential risk of loss due to workers' exposure to the hazards of work in a particular type of industry (or in many cases, in the employ of a particular producer within the industry), and individual premiums are calculated in terms of so many dollars per one hundred dollars of payroll.[11] Thus, a producer's compensation costs are a function of both the degree of hazard to which his employees are exposed and the numbers of them so exposed. Assuming that a producer's use of labor is economically efficient, and that through health and safety measures he has minimized the risk of employee injuries, then his compensation costs should rise and fall along with his level of production and, consequently, his revenues. If consumers won't buy his product when compensation costs are reflected in its price, and if he can't absorb those costs and still make a profit, then compensation mechanisms merely have facilitated a market judgment that his enterprise lacks economic utility.

In the case of Title IV, however, Congress has chosen these mechanisms as the means by which the costs of providing benefits to inactive miners will be imposed upon mine operators—just as though these costs arose out of losses incurred in connection with current mine production. Put to this use, compensation mechanisms cease to function rationally and become an arbitrary economic force.

Consider the example of an operator of an efficient, economically viable enterprise who is perfectly capable of bear-

11 See Reall Deposition, Note 10 *supra* at 9-14; *National Commission Report*, Note 9 *supra* at 93-98; Riesenfeld, Note 8 *supra* at 372,ff.

ing the workmen's compensation costs associated with the activity of his present employees in the current production of coal, and is perfectly capable of profitably selling that coal at an aggressively competitive price:

—the operator of this mine, however, might have been in the mining business for decades, while his competitor has not; his exposure to the claims of now inactive former employees, or their survivors, therefore, will be much greater than that of his competitor;

—at some time in the past he may have engaged in mining on a much larger scale and employed far greater numbers of miners than he does now, while his competitors have not;

—unlike his competitor, he may have acquired mining properties from other operators for whose inactive former employees he also would be held responsible under Title IV[12];

—his competitor's former employees might reside in areas where they can find other employment, while his might be concentrated in areas where mining employment has declined and no other work is available.[13]

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12 If he acquired surface mining properties after 1969 but prior to 1972, he would not even have been aware that he was assuming this obligation, because the Act did not originally impose liability on successor operators for the employees of prior operators of surface mines acquired after 1969. This obligation was added by the 1972 amendments. See Act, Section 422(i); 30 USC §932(i).

13 Under Title IV, inactive miners who are capable of working nevertheless are considered "totally disabled" and eligible for benefits if they cannot find coal mining employment or nonmining employment suitable to their age, education and experience in the immediate area of their residence. Act, Section 402(f); 30 USC §902(f).

In short, this mine operator could be faced with a potential claims liability completely disproportionate to the number of miners he currently employs—indeed, he could have more claims than he has employees. There is no way this operator can avert this potential liability through exercise of choice or modification of his conduct, as he is capable of doing in the case of his present work force. His competitor, unburdened by this liability, has the distinct advantage, even though both operators may employ the same number of miners in equally efficient and equally safe mining activities.

Since workmen's compensation insurance rates are established on a state-to-state basis,[14] these same forces can operate with an equal vengeance on the entire mining industry of a state. In a state where mining has been a major factor in the state's economy for many years and which now numbers among its population a great many former miners who cannot find suitable nonmining employment, mine operators will be confronted with compensation costs much higher than those of competing operators in states where mining is a new industry, even though the two states' industries may be competitive when measured in terms of the cost-efficiency of current production.

If there is a justification for Congress having chosen a scheme for the economic relief of inactive miners that results in such arbitrary discriminations among competing mine operators otherwise similarly situated, it must be sought somewhere other than in the principles and policies underlying conventional workmen's compensation mechanisms.

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14 See Reall deposition Note 10 *supra* at 6-8; Exhibit A.

B. Viewed as a reparations law, Part C is irrational, and arbitrarily discriminatory.

The legislative history of Title IV (discussed at pages 6-15 *supra*) leaves little doubt that Congress enacted the provisions of the law granting benefits to inactive miners and their families out of a conviction that relief in the form of reparations was owing these persons as a matter of national moral obligation, because of ". . . the utter failure of all of us, and that includes the industry, the medical profession, and the Government—particularly the Public Health Service—to recognize this disease . . .",[15] and because these persons

> . . . were mining coal for national consumption, and for an industry under intense Federal pressure to keep the cost of the fuel low. The entire Nation benefited from the use of the coal and its low cost. The entire Nation then, has an obligation to [these] miners . . .[16]

In this respect, the law embodies a philosophy strikingly similar to that expressed in proposals for payment of reparations to Japanese Americans, American Indians and Black Americans for past wrongs.[17] Congress rationally might have chosen as its means to finance these reparations to impose that entire burden directly on the public, as it

15 See p. 9, *supra*.

16 See p. 13, *supra*.

17 See, *e.g.* Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 533 (1945); *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, 269, 272-73 (U.S.C.C. 1955) (discussing the purposes and policies underlying the Indian Claims Commission Act); Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. Rev. 1063 (1968).

partially did in Part B of Title IV, or to impose it indirectly on the consumers of coal through a uniform exaction from the industry on the basis of size of payroll or production, which equitably could be passed on to consumers through pricing.

But, it bears repeating, Congress did not impose this liability on "the industry," it imposed it on individual mine operators according to certain past employment relationships. If the operator-liability provisions of Part C are to be justified as a device for financing economic relief to inactive miners by exacting the costs of the program from former employers whose conduct in the past, although lawful, is now considered to have been morally wrong, then these provisions are reasonable only to the extent that they impose their burden on the blameworthy alone. The operator-liability provisions of Part C are patently arbitrary and irrational in this respect.

Under the law, a mine operator is not singled out to bear the responsibility for paying benefits to any particular inactive miner-claimant (or claiming survivor) on the basis of evidence of irresponsible mining activity in the past, or evidence that he knowingly exposed his employees to hazards and failed to take heed of their need for protection, or any other considerations going to the question of the culpability of his past conduct.

The operator to be held responsible is singled out merely on the basis of the recentness of his employment relationship with the claimant and his financial ability to pay the benefits,[18] neither of which has anything at all to do

18 The statutory and regulatory provisions governing identification of "responsible operators" are set out in Section 422(h); 30 USC §932(h) of the Act and in Subpart D of Part 725, 20 C.F.R.

with the causes of the claimant's condition, much less any moral wrongdoing that might be associated therewith. An operator could be held responsible to a claimant who worked for several other operators in dusty and dangerous underground conditions for twenty or thirty years, while only having worked for him for a short time under completely healthful conditions; he could be held responsible to a claimant who has never worked for him at all, if he has acquired mining property from one of the claimant's former employers; or he could be held responsible solely because the claimant's more recent former employers have gone out of business, or are not able to pay benefits.

C. Summary.

Title IV represents a radical and constitutionally suspect departure from sound compensation theory. The theory of private reparations financing embodied in the law could become precedent for almost infinite permutations in legislative classification—of both those to bear the burden and those to gain the benefits of such laws. To plaintiffs' knowledge, neither Congress nor any state legislature has ever enacted an employer-financed workmen's compensation law that covered persons who had ceased to be workmen prior to the enactment of the law.

The constitutionality of early state workmen's compensation laws was upheld by this Court upon the basis of the Court's recognition of the principles of compensation theory described earlier in this discussion. See *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 203-205 (1917); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 244 (1917). The Court felt it of enough significance to note (in *New York Central*), that ". . . it [the law] has no

retrospective effect, and applies only to cases arising some months after its passage," 243 U.S. at 202, and (in *Mountain Timber*), that the law ". . . disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro*." 243 U.S. at 236.

Plaintiffs are aware of only one federal legislative parallel to the inactive-miner provisions of Title IV, and that is a provision in the Railroad Retirement Act of 1934 requiring railroads to finance pensions for workers who had retired within a year before enactment of the law. That provision was declared unconstitutional by this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935).[19]

The court below erred in distinguishing *Alton* and upholding the statute on the basis that "the Court in *Alton* recognized a fundamental difference between compensation type laws which deal with existing rights and liabilities and the Act there under consideration which sought to impose 'a new incident, without reference to any existing obligation or legal liability' upon the employer-employee relationships," while the duties imposed on coal mine operators by Title IV are based on standards "sounding in

[19] Plaintiffs appreciate that the primary holding of the *Alton* case—that the Railroad Retirement Act as a whole was beyond Congress' powers under the Commerce Clause (Justices Roberts, Van Devanter, McReynolds, Sutherland and Butler for the majority; Chief Justice Hughes, and Justices Brandeis, Stone and Cardozo, dissenting)—has been severely criticized, along with many other decisions of that era, as representing a discredited judicial philosophy. But *Alton* was not a single issue case. Chief Justice Hughes, speaking for the four dissenters, agreed with the majority that the "retroactive" pension provision was ". . . arbitrary and beyond the power of Congress," 295 U.S. at 389, and plaintiffs are not aware that this unanimous view has lost its force.

tort." (J.S. No. 74-1302, App. A, p.5A) The sounder view was expressed in *Alton* by Chief Justice Hughes, who recognized that ". . . compensation and pension measures for employees rest upon similar considerations," 295 U.S. at 383, and that "the fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age", 295 U.S. at 384, but who, nevertheless, agreed ". . . with the conclusion that the requirement that the carriers shall pay retiring allowances to [persons who left their employment prior to enactment of the law] is arbitrary and beyond the power of Congress". 295 U.S. at 389. Actually, compensation laws represent a public superimposition of rights and duties on the employer-employee relationship in lieu of rights and duties sounding in tort, see *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 203 (1917); Cf. 1 Larson's Workmen's Compensation Law §2, and as such, should be considered no more or less quasi-contractual than a duty imposed by law to pay pensions to employees, and no less arbitrary when imposed after the employment relationship has ended.

II.

TITLE IV SUBJECTS PLAINTIFFS TO LIABILITY AS EMPLOYERS FOR DISEASES AND DISABILITIES THAT ARE NOT EMPLOYMENT RELATED, IN VIOLATION OF THEIR RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW.

Plaintiffs have shown in the discussion preceding, that, while Part C of Title IV of the Coal Mine Health and Safety Act is framed as a workmen's compensation law, it contains unconstitutionally arbitrary reparations features which represent a radical departure from compen-

sation theory. That is not the only respect in which the law is novel. Congress also has abandoned the principle that workmen's compensation ought to be paid only in connection with work-related disability. Under Title IV, mine operators not only may be held liable to active and inactive miners who are totally disabled by coal workers' pneumoconiosis—they also may be held liable to claimants who are totally disabled by nonwork-related respirable diseases, and to claimants whose respirable disease may or may not be work-related, but who, in any event, are not totally disabled by it.

A. Under Title IV, mine operators will be required to pay compensation to claimants whose diseases are not work-related.

Although the expressed purpose of Title IV is to provide for the payment of workmen's compensation benefits only to miners and the survivors of miners totally disabled *by pneumoconiosis arising out of employment in coal mines,* under the provisions of Title IV governing administrative determinations of cases of compensable disease and disability, it is *impossible for the agencies responsible for adjudicating claims to distinguish between claimants disabled by work-related pneumoconiosis, and those disabled by some other, nonwork-related respirable disease.*

Application of these provisions—the employment presumptions set out in section 411(c); 30 USC §921(c) and the diagnostic limitations set out in section 413(b); 30 USC §923(b)—to the adjudication of claims for benefits under Part C thus will result in the imposition of liability upon mine operators to pay benefits merely upon evidence of a former employment relationship and evidence of a respi-

rable disease, whether the disease arose out of that employment, or not.

1. *Background: what "coal worker's pneumoconiosis" is, and how it is diagnosed.*

Nonwork-related pulmonary diseases, such as emphysema and chronic bronchitis, for example, are common to the general population, coal miners included. Chronic bronchitis and emphysema appear in all walks of life, often to a severely disabling degree. Several studies have shown that chronic bronchitis exists in twenty to twenty-five per cent of adult males in the general population, and that eight to fifteen per cent of adult males exhibit abnormally high chronic airway obstruction. Studies of the lungs of autopsied adult males living in urban areas show that half of them demonstrate the anatomical lesion of emphysema, ten per cent to a severe degree. Approximately six per cent of all benefit awards under the Social Security disability program for the general public are for severe disability caused by these diseases.[20] To be distinguished from these diseases of the general population are those diseases associated with or caused by particular kinds of occupations. Coal worker's pneumoconiosis (CWP) is one such "occupational disease."

The term "pneumoconiosis" refers to "a fibrous induration of the lungs due to the irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc."[21] The term

[20] Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess., *Hearings on S. 2675, S. 2289, H.R. 9212* 381 (Hereinafter cited: "*1972 Senate Hearings*").

[21] Stedman's Medical Dictionary 1264 (21st Ed. 1966).

is defined in section 402(b) of the Act, 30 USC §902(b) as ". . . a chronic dust disease of the lung arising out of employment in a coal mine." A more detailed definition of coal worker's pneumoconiosis is found in a United States Public Health Service study of the disease:[22]

> Coal pneumoconiosis is a distinct clinical entity that results from inhalation of coal mine dust. The clinical diagnosis is based on roentgenographic evidence of nodulation together with a history of long-term exposure to coal dust. Coal pneumoconiosis is classified into two forms: simple pneumoconiosis and complicated pneumoconiosis.

Simple coal worker's pneumoconiosis, unless far advanced, does not in itself produce recognizable pulmonary impairment. Complicated pneumoconiosis can cause disabling pulmonary impairment of a predominantly restrictive nature. Chronic bronchitis and emphysema, which, as noted above, are themselves capable of causing severe physical disability, do not constitute diseases to be designated as pneumoconiosis. Some miners with, and some without, pneumoconiosis, may also have, along with the general population, disabling chronic bronchitis or emphysema, or both, but these diseases are not caused by pneumoconiosis arising out of exposure to coal dust.[23]

Until 1969 there was little data available concerning the amounts of uncontrolled coal dust to which persons in various mining occupations typically were exposed, or what constituents, particle sizes, and concentrations of dust were

[22] Public Health Service, U.S. Dep't of Health, Ed. & Welfare, (Lainhart, Doyle, Enterline, Henschel & Kendrick) *Pneumoconiosis In Appalachian Bituminous Coal Miners* 3 (1969).

[23] *1972 Senate Hearings* 380-83.

hazardous. In fact, coal worker's pneumoconiosis was not generally recognized as a separate disease entity in the United States until the 1950's; prior to that time, it was thought to be a form of silicosis arising out of rock dust generated principally in the mining of anthracite coal.[24]

In 1969, in a report submitted to the Senate Committee on Labor and Public Welfare in connection with its consideration of the then-pending Coal Mine Health and Safety Act, the Department of Interior estimated that the average dust level in mines was 7 milligrams per cubic meter of air, and that reduction of that level to 2 milligrams would reduce the probability of a miner developing simple pneumoconiosis from a rate of 36% per 1000 miners after 35 years' exposure, to a rate of 2%.[25] Congress enacted this standard into law in Section 202 of the Act, 30 USC §842, which required that mines achieve a 3 milligram dust level within 6 months after enactment and a 2 milligram level by the end of 1972.

2. *The statutory presumptions set out in section 411(c) are not fairly rebuttable.*

In determining the eligibility for benefits of a claimant who has worked in coal mines for ten years or more, the defendant Secretary of Labor is required by section 411 (c) of the Act, 30 USC §921(c) to presume certain facts about the nature and cause of the claimant's physical condition.

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24 See generally, *Id.* at 572; Public Health Service, note 22 *supra* at 15-19.

25 S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969), printed in *1969 Legislative History* 16-17.

If the claimant has "pneumoconiosis" (within the broad meaning given that term by regulations of the defendant Secretary of Health, Education and Welfare), the Secretary is to presume that the disease arose out of mine employment; if the claimant has worked fifteen years or more in underground mines, or a similar environment, and has a "totally disabling respiratory or pulmonary impairment" (again, within the broad definitions assigned to those terms by HEW regulations), the Secretary is to presume that his condition was caused by pneumoconiosis.[26] These presumptions govern the determinations of causation and disability to be made in connection with the claims of survivors of such miners, as well. A survivor of a miner who worked ten years in coal mines also is given the benefit of a presumption that the miner died "due to pneumoconiosis", if he died from any "respirable disease".[27]

These presumptions are termed "rebuttable" in the Act, and if that were true in fact, they would be less cause for concern—because they would only operate to shift to mine operators the burden of proving that a miner's disease was not work-related. The Act, however, mandates application of evidentiary standards and limitations in the adjudication of claims that effectively preclude a diagnostic distinction between work-related and nonwork-related respirable diseases, and consequently these presumptions are irrebuttable for all practical purposes.

Prior to 1972, claims for benefits under Title IV were processed and adjudicated according to the procedures utilized in determining entitlement to claims for disability

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26 Act, section 411(c)(1) and (4); 30 USC §921(c)(1), (4).

27 Act, section 411(c)(2); 30 USC §921(c)(2).

benefits under the Social Security Act, except that, unlike the Social Security disability program, it was necessary under Title IV to establish a causal connection between the claimant's respirable disease and exposure to dust in coal mining employment. [28] The Secretary of Health, Education and Welfare (who then was responsible for administering the program) recognized that this causal connection could be demonstrated only by x-ray diagnosis in the vast majority of cases, and promulgated regulations requiring such evidence to establish entitlement to benefits:

> Under Part B of Title IV, a miner is entitled to benefits if he is totally disabled due to pneumoconiosis. In line with this requirement, the regulations specify that, regardless of other impairments, total disability must be found to be caused by pneumoconiosis which is defined in the statute as a chronic dust disease of the lungs which has arisen out of employment in underground coal mines.
>
> To establish the causal or occupational connection with coal workers' pneumoconiosis, the regulations provide that there must be X-ray evidence of pneumoconiosis in the living applicant (in a rare case, a biopsy). This is based on the prevailing medical judgment that in the absence of positive X-ray evidence, the disease does not exist or exists to a degree that would have no significant effect on the claimant's functional capacity.
>
> There is some minority medical opinion to the effect that disabling pneumoconiosis may exist in the absence of "positive" X-ray evidence thereof. However, this issue was thoroughly considered by the

28 Act, section 413(b); 30 USC §923(b).

> Social Security Administration, through extensive consultation with a wide range of medical specialists, and the requirement was included in the regulations as reflecting the overwhelming consensus of medical judgment on the issue.[29]

Concern on the part of some over the high rate of claims denied because of lack of evidence of occupationally related pneumoconiosis resulted in a movement in 1971 to amend the Act to broaden its coverage to include "any respiratory or pulmonary diseases or impairments and their sequelae arising out of employment" in a coal mine, and to prohibit denial of claims solely on the basis of X-ray evidence that the claimant did not have pneumoconiosis.[30] The Secretary of HEW strongly opposed these changes in the law on the ground that it would be impossible to make medically valid determinations of total disability due to pneumoconiosis under them. In a formal appraisal of the proposals submitted at the request of the Senate Committee conducting hearings on the amendatory bills, he said:

> The overwhelming consensus of expert medical opinion is that when a good quality X-ray is classified negative for pneumoconiosis, the disease (if it exists at all) does not exist in the individual to a disabling degree, nor can any disabling lung impairment he may have be attributable to that disease. Therefore, when the X-ray is negative, there is a sound medical basis for determining that the individual is not totally disabled due to pneumoconiosis. Breathing tests are valuable

29 U.S. Dep't of Health, Education & Welfare, *First Annual Report on Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969* 18 (Printed by the House Committee on Education and Labor, June, 1971).

30 *1972 Senate Hearings* 1-21.

to determine whether an individual has a lung impairment, but they do not serve to identify the presence of pneumoconiosis as distinguished from other, nonwork-related, lung impairments.

Thus, if the Social Security Administration is prohibited from denying claims on the basis of a negative X-ray, it would be faced with a serious dilemma in making medically-valid determinations of total disability due to pneumoconiosis under the law.

Nor would this problem be ameliorated in any way by the provision . . . extending benefits to miners (and their widows) disabled from any other respiratory or pulmonary diseases or impairments arising out of employment in an underground coal mine. On the basis of present medical knowledge, there is no established causal connection between coal mine employment and any disabling lung disease other than coal workers' pneumoconiosis. Therefore, there would be no sound medical basis for finding miners eligible under this provision on the basis of any lung disease other than pneumoconiosis.

Miners, like many others in the general population, have breathing difficulty due to emphysema, chronic bronchitis or other respiratory disorders not causally related to mine employment. *To pay black lung benefits on the basis of nonoccupational diseases would be altogether inconsistent with the concept of occupational causality basic to the law.*[31]

The Secretary of Labor also opposed the changes:

> . . . concern over the X-ray test derives at least in part from a widespread misunderstanding about the scope of Title IV. When the Act became effective, many miners who were partially or totally disabled due to diseases other than "black lung" believed that they were eligible to receive Title IV benefits. In some cases, the disabling disease was a respiratory ailment, such as emphysema or chronic bronchitis. Such persons find it difficult to accept the determination, however valid medically, that their disabilities do not make them eligible for Title IV benefits, even though they may be as severely disabled as their counterparts suffering from pneumoconiosis. But Title IV is aimed at a specific and pervasive evil—the "black lung" disease. Pneumoconiosis is without question an occupational disease, and the concept of occupational causality is basic to Title IV. To expand Title IV to cover all respiratory and pulmonary impairments would confront the Social Security Administration with the task of verifying the work-related nature of such diseases, which, according to prevailing medical testimony, is impossible. This would be, we believe, a drastic and unwise change in the nature of the law.[32]

Extensive testimonial and documentary evidence was presented to Congress demonstrating the proposition that, according to the overwhelming consensus of expert medical opinion, coal workers' pneumoconiosis was the only respirable disease for which there was an established occupational relationship, and that it could only be diagnosed in the vast majority of cases by x-ray examination.[33] Proponents of the amendments, on the other hand, presented much evidence to show that respirable diseases other than coal worker's pneumoconiosis were prevalent in the mining population, but negligible medical evidence that such diseases were related to occupational exposure to dust, or that coal worker's pneumoconiosis could be diagnosed in the absence of x-ray evidence of the disease.[34] That the con-

31 *1972 Senate Hearings* 27-28 (Emphasis added).

32 *1972 Senate Hearings* 566-67.

33 See, *e.g.*, *1972 Senate Hearings* 375-385, 409, 442-450, 465-68, 552.

34 See, *e.g.*, *1972 Senate Hearings* 72, 115-129, 135, 138-141, 151, 165.

sensus of expert medical opinion was to the contrary was not seriously disputed.

Congress refused to amend the Act to expand the scope of its coverage to include respiratory impairments other than pneumoconiosis, but did add the following language to Section 413(b); 30 USC §923(b):

> . . . [N]o claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgengram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, x-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

Since there is no practical way to diagnose respiratory impairment as work-related pneumoconiosis without x-ray evidence, notwithstanding the amendment's illusory prescription of other diagnostic methods, this language, whether by accident or intent, expands the eligibility standards of the Act to include other respiratory impairments as effectively as the rejected amendment would have.

The Secretary of HEW, as of course he must, has promulgated rules and regulations governing determinations of benefits eligibility which reflect the diagnostic principles embodied in this amendment,[35] making the "rebuttable" "irrebuttable" for all intents and purposes. Under these regulations, even if x-ray evidence (or biopsy, or

[35] 20 CFR Part 410, Subpart D.

autopsy) fails to establish the existence of pneumoconiosis, such a finding is justified if other relevant evidence establishes the existence of a totally disabling chronic respiratory or pulmonary impairment.[36]

"Other relevant evidence" includes:

> . . . medical tests such as blood gas studies, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the miner's physician, his spouse's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the individual's physical condition, and other supportive materials.[37]

Criteria for ventilatory studies (which are designed merely to show breathing capacity) are set out in the regulations[38] and medical specifications justifying a finding of total disability due to pneumoconiosis are set out in an Appendix to 20 CFR Part 410, Subpart D.

Application of these criteria and specifications, or the other "medically equivalent" tests permitted by the regulations,[39] unavoidably will result in the diagnosis of noncompensable, nonwork-related respiratory impairments as compensable pneumoconiosis.

In cases where the employment presumptions discussed above are applicable, not even the medical criteria and specifications in the regulations need be satisfied, and the regulations do not describe, recognize, or acknowledge any means whereby these presumptions might be rebutted.

[36] 20 CFR §§410.414(c), 410.454(c).
[37] 20 CFR §410.414(c).
[38] 20 CFR §§410.426(b), 410.430.
[39] 20 CFR §§410.424(b), 410.426(d).

3. ***Presumptions based upon duration of employment constitute arbitrary and irrational bases for the adjudication of claims for disability due to pneumoconiosis.***

Coal workers' pneumoconiosis is caused by breathing coal dust, and the likelihood of a miner developing it depends upon the concentrations of dust to which he is exposed and the length of time he is exposed to them. That Congress recognized these facts at the time it enacted the Coal Mine Health and Safety Act is reflected by its inclusion in the law of strict provisions for dust control in mines and provisions for the transfer of miners threatened with the disease to less dusty work areas.[40]

Not all mine work involves exposure to dust, yet the presumptions in question arbitrarily are based upon the number of years spent in mining employment rather than duration of exposure to coal dust. Even if there were some basis for assuming that exposure for a given time to the concentrations of coal dust that existed in mines prior to the institution of dust controls would cause the disease, it is irrational to assume that causal relationship with respect to exposure for the same length of time to far smaller concentrations of dust (see discussion at pp. 48-49, *supra*).

It cannot reasonably be assumed that all mine workers are exposed to the same dust conditions, but even if it could be, it still would not follow that they all are exposed to the same risk of disease after a given number of years of employment. In hearings on proposed amendments to the law held in February and March of 1975, the Departments of Labor and Health, Education and Welfare told

40 Act, sections 202, 203(b)(2); 30 USC §§842, 843(b)(2).

the House Subcommittee on Labor Standards that their agencies had found no medical evidence to support a conclusion that development of coal workers' pneumoconiosis in a miner could be related to duration of employment even for periods as long as 35 years.[41] Extensive studies conducted by the U.S. Public Health Service's Appalachian Laboratory for Occupational Disease reached the same conclusion, and that is the view of the American Lung Association.[42] Notwithstanding all of the foregoing, under the statutory presumptions in question, operating in combination with the diagnostic criteria mandated by the Act, a claimant may be awarded benefits for which a mine operator is liable merely because he has or had been employed in mining for a given number of years and suffers from a respiratory condition that is just as likely to be nonoccupational in origin.

B. Under Title IV, mine operators will be required to pay benefits to claimants who are not totally disabled by any disease.

Relaxation of the eligibility standards to a point where claimants physically disabled by nonwork-related respiratory impairments could qualify for benefits was not the only change made in the law in 1972. Congress also amended the definition of "total disability" in the Act to provide that ". . . a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities

41 House Comm. on Education and Labor, Subcomm. on Labor Standards, 94th Cong., 1st Sess., *Hearings on H.R. 7, H.R. 8, H.R. 3333* (*"Black Lung Benefits Reform Act of 1975"*) pp. 127, 216.

42 *Id.* at 79-83; 106-114; 232.

comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time."[43]

This amendment was designed to make benefits available to former miners who are not actually physically incapable of gainful employment, but who cannot find employment "comparable" to that they once held in mining, because of age, lack of education, lack of experience, or the absence of such employment opportunities near where they live.[44]

The Secretary of HEW had opposed this change as introducing a principle into the law that was inconsistent with the philosophy of a workmen's compensation program:

> Under present law and regulations, a miner is considered "totally disabled" if he is unable, by reason of pneumoconiosis, to engage in any substantial gainful activity.
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> • • •
>
> It would appear most inappropriate to define total disability for all cases as inability to work as a miner, particularly where the individual is actually performing, or obviously has or has demonstrated the capacity to perform, nonmining work. As a workmen's compensation benefit, the black lung payment is designed to compensate for loss of earning power, *not as an indemnity or welfare payment.*[45]

The Secretary of Labor joined in this opposition.[46]

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43 Act, section 402(f); 30 USC §902(f).

44 See *1972 Senate Hearings* 3.

45 See *1972 Senate Hearings* 28-29 (Emphasis added).

46 *Id.* at 567.

Under the regulations which the Secretary of HEW was required to promulgate to implement this change in the law, a claimant who has a respiratory impairment presumed or found to be pneumoconiosis under the liberal standards discussed above, but who is not totally physically disabled even within the liberal medical criteria set out in the regulations, nevertheless will be entitled to benefits if he cannot do his previous coal mine work, and cannot find comparable work within the immediate area of his residence because of his age, lack of education or lack of experience.[47]

For example, in the great majority of the cases referred to at pages 30-31, footnote 1, *supra,* the claimant who had been found to be "disabled" by occupational disease by the Department of Labor, had indicated on his application that he left mining for reasons such as retirement, or to start his own business, or, most often, because the mine had closed,

C. Use of these arbitrary and irrational standards in the adjudication of claims under Part C will violate coal mine employers' rights to due process and equal protection of the law.

Plaintiffs' contention that Congress has created period-of-employment presumptions governing eligibility determinations that arbitrarily imbue cases of nonoccupational disease and disability with presumptive merit and hedged the claims determination process with medically invalid diagnostic limitations, demands factual resolution. This Court has said that statutory provisions that permit or compel inference of a fact from proof of another when

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47 20 CFR §§410.412(a)(1), 410.426(a).

there is no rational connection between the fact proved and the ultimate fact to be presumed therefrom, or that do not afford fair opportunity to rebut such presumptions even where a rational connection may exist, are forbidden by the Due Process clauses of the Fifth and Fourteenth Amendments because they amount to legislative arbitrariness. See, *e.g., Cleveland Bd. of Ed.* v. *LaFleur,* 414 U.S. 632, 644 (1974); *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois,* 405 U.S. 645, 657 (1972); *Leary* v. *United States,* 395 U.S. 6, 31 (1969); *Tot* v. *United States,* 319 U.S. 463, 467 (1943); *Heiner* v. *Donnan,* 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin,* 270 U.S. 230, 239-40 (1926).[48]

Leary v. *United States, supra,* which involved a criminal statute, is the leading case in this area because of its careful explanation of the governing law, and, as will be seen later, for the guidance it offers in resolving constitutional challenges to statutory presumptions. Speaking of *rebuttable* presumptions, this Court said:

> Early decisions of this Court set forth a number of different standards by which to measure the validity of statutory presumptions [Footnote omitted]. However in *Tot* v. *United States,* 319 U.S. 463 (1943), the Court singled out one of these tests as controlling, and the *Tot*

48 See also, *Andrews* v. *Drew Mun. Sch. Dist.,* 507 F. 2d 611, 614 (5th Cir. 1975); *Owens* v. *Roberts,* 377 F.Supp. 45, 52 (M.D. Fla. 1974); *Juster Bros.* v. *Cristgau,* 7 N.W.2d 501, 507 (Minn. 1943); *Carolene Milk Products Co.* v. *McLaughlin,* 5 N.E.2d 447, 450 (Ill. 1936). The case of *Owens* v. *Roberts, supra,* is especially pertinent to this case, because it involved a statutory presumption that was termed rebuttable, but in fact had been rendered irrebuttable by regulations promulgated under the statute. See 377 F.Supp. at 49-50.

> rule has been adhered to in the two subsequent cases in which the issue has been presented.
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> The Court, relying upon a prior decision in a civil case [Footnote omitted], held that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the fact proved and the fact presumed." 319 U.S., at 467. [395 U.S. at 32-33]

More recently, this Court has cited the *Leary* case, among others, in striking down an *irrebuttable* civil statutory presumption concerning student residency for tuition purposes. *Vlandis* v. *Kline, supra.* The Court said in that case:

> Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments. In *Heiner* v. *Donnan,* 285 U.S. 312 (1932), the Court was faced with a constitutional challenge to a federal statute that created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment by his estate of a higher tax. In holding that this irrefutable assumption was so arbitrary and unreasonable as to deprive the taxpayer of his property without due process of law, the Court stated that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Id.,* at 329. [412 U.S. at 446]

Plaintiffs contend that the presumptions in question in the case at bar are constitutionally vulnerable in each of the respects discussed above.

Congress may not, by legislative fiat, enact into existence facts that do not, and which cannot be made to, exist in actuality. See *Heiner* v. *Donnan,* 285 U.S. 312, 329 (1932).

The rationality of a statutory presumption, therefore, must be determined as a matter of fact. This Court said in the *Leary* case, *supra*, that in determining the rationality of presumptions dealing with matters not within specialized judicial competence or not completely commonplace, significant weight should be accorded the capacity of Congress to "amass the stuff of actual experience and cull conclusions from it"; but that, since such determinations are "empirical", courts must consider all relevant direct and circumstantial data. 395 U.S. at 38.

In *Leary*, this Court found that legislative history did not supply an adequate basis for determining whether it was rational to presume that a person possessing marijuana had knowledge of its origin, and consequently undertook to ascertain the factual rationality of the presumption from other data. Finding floor debates and committee reports unhelpful, the Court considered testimony given at committee hearings, written statements and documents submitted to the committees, published reports of federal and state agencies dealing with collateral matters, and even current periodicals and books. See 395 U.S. at 39-40.

The same sort of evidentiary inquiry is called for in the instant case. Legislative history, viewed in the light most favorable to defendants, affords little help in determining the rationality of the presumptions in question. If anything, it tends to demonstrate their irrationality. Congress considered the possibility that respiratory diseases other than pneumoconiosis might be occupationally related to coal dust exposure, and rejected proposals to amend the law to that effect. There is substantial medical evidence, however, (including evidence submitted to Congress by the Department of Health, Education and Welfare, and the

Department of Labor), showing that in actuality the law is not so limited. This internal inconsistency of purpose and effect is sufficient in itself to condemn Title IV as irrational.

As a consequence of this violation of their right to due process of law, mining employers arbitrarily are singled out as a class to bear the burden of providing economic relief in connection with diseases and disabilities that are not causally related to mining employment, in violation of their right to equal protection of law. Compare, *Stanley* v. *Illinois*, 405 U.S. 645, 658.

As noted earlier in this Brief, principles of equal protection of law implicit in the Due Process Clause of the Fifth Amendment require that federal legislative classifications must have a fair and substantial relation to the object of the legislation. See discussion at pp. 31-32, *supra*. Equal protection requires not only a nondiscriminatory application of the law within a burdened class, but that there be some rationality in the nature of the class singled out to bear the burden, and that it have some relevance to the law's purpose. *James* v. *Strange*, 407 U.S. 128, 140 (1972); *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966); *Schilb* v. *Kuebel*, 404 U.S. 357, 383 (1971) (Dissenting opinion of Mr. Justice Stewart); *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 413, 429 (1935).

The clear and singular purpose of the law in question here is to compensate workers and their surviving relatives for economic loss suffered as a result of total disability by one occupational disease—pneumoconiosis. However, the law also singles out coal mining employers such as plaintiffs to bear the burden of compensating their employees for diseases that are *not* connected with employment, such as emphysema and chronic bronchitis, and for

"disabilities" *not* connected with occupational disease, such as the "disabilities" of age, lack of education, or lack of employment opportunities.

Imposing this obligation on employers is no more rational than imposing an obligation on them to provide economic relief to employees, their families and survivors financially distressed by any and all diseases and disabling accidents that they may encounter in life along with the general population, regardless of their occupation. Such logic equally would justify requiring employers to indemnify their employees for any economic loss, whatever its cause, for no reason other than that they are employees.

Absent some *nexus* between the mining employment relationship and the disabling diseases for which benefits are awarded, there is no justification for imposing the compensation burden only on a mining employer to the exclusion of any other nonmining employer or employers for whom the claimant may have worked prior to, or after, his mining employment. In fact, absent such *nexus*, any class of persons or businesses might, with equal reason, (or lack thereof) be designated to bear this burden. A law of which that can be said must be considered unconstitutionally arbitrary.

The court below recognized that two of the presumptions set out in the Act were arbitrary and unreasonable, and correctly concluded that their use in the adjudication of claims for which plaintiffs might be responsible would violate plaintiffs' right to due process of law. The district court held that the irrebuttable presumption in Section 411(c)(3) of the Act, 30 USC §921(c)(3), which ". . . not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner . . ." was a ". . . departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed", and that to the extent ". . . that such presumption purports to making a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary". (J.S. No. 74-1302 App. A, pp. 9A-10A).

The court reached the same conclusion with respect to the language in Section 411(c)(3) limiting the evidence that could be presented in rebuttal to a presumption of total disability to evidence that the miner did not have the disease at all, or did not contract it in connection with employment in a coal mine. The court noted that (1) Congress had made no finding that pneumoconiosis, *per se,* was disabling; (2) that it was irrational to require proof of absence of the disease in order to dispel a presumption of total disability from it, when the Act itself does not predicate liability on the mere existence of the disease; (3) that it was irrational to require rebuttal evidence that a miner's disease did not arise out of employment in *any* coal mine when the Act itself limits operator liability to disease arising, at least in part, out of *the operator's* coal mine, and (4) that it could find no basis upon which Congress could ". . . deprive a litigant of the right to produce whatever evidence may be admissible generally in attempting to rebut a presumption without offending due process." (J.S. No. 74-1302 App. A, pp. 11A-12A).

It would appear from a reading of the entire opinion below that the district court felt constrained to consider

the rationality of the presumptions set out in the Act only from the standpoint of their consistency within the terms of the Act itself. Thus, the court felt it sufficient to note with regard to plaintiffs' challenges to other presumptions in the law, that legislative history indicated there was some rational basis for them and that they simply served to shift the burden of proof. (J.S. No. 74-1302 App. A, pp. 8A-9A). The court acknowledged, but failed to address itself to, plaintiffs' contention that the mere labeling of a presumption as "rebuttable" should not foreclose examination of it to determine whether in fact it *is* fairly rebuttable. Plaintiffs submit that the district court erred in failing to undertake that inquiry.

Plaintiffs believe that there was sufficient evidence before the court on their motion for summary judgment to justify a finding that the so-called "rebuttable" presumptions in the Act were not in fact fairly rebuttable; that they operated to fix liability on mine operators in the unconstitutionally arbitrary fashion described above. That evidence was sufficient at least to show that a material issue of fact was in dispute that required resolution at trial. These were issues upon which findings of fact and conclusions of law should have been made. If judicial inquiry into issues of fact such as those raised by plaintiffs in this case is forbidden, then the Constitution's safeguards against arbitrary statutory presumptions and over-inclusive legislative definitions are illusory.

CONCLUSION

For the reasons stated herein, the judgment of the district court appealed from in Case No. 74-1302 should be affirmed; the judgment of the district court appealed from in Case No. 74-1316 should be reversed with directions to enter judgment for the plaintiffs for the relief demanded in their complaint; in the alternative, the judgment appealed from in Case No. 74-1316 should be vacated and the cause remanded for trial.

Respectfully submitted,

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APPENDIX

APPENDIX

TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

83 Stat. 742 (30 U.S.C. §901, *et seq.*), as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150.

TITLE IV — BLACK LUNG BENEFITS

Part A — General

Sec. 401; 30 USC §901:

Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Sec. 402; 30 USC §902:

For purposes of this title—

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(Statutes Involved)

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

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(f) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423 (d) of Title 42.

• • •

Part B — Claims for Benefits Filed on or Before December 31, 1973

Sec. 411; 30 USC §921:

(a) The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis.

(b) The Secretary shall by regulation prescribe standards for determining for purposes of subsection (a) of this section whether a miner is totally disabled due to

(Statutes Involved)

pneumoconiosis and for determining whether the death of a miner was due to pneumoconiosis. Regulations required by this subsection shall be promulgated and published in the Federal Register at the earliest practicable date after December 30, 1969, and in no event later than the end of the third month following December 1969. Final regulations required for implementation of any amendments to this subchapter shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of such amendments, and in no event later than the end of the fourth month following the month in which such amendments are enacted. Such regulations may be modified or additional regulations promulgated from time to time thereafter.

(c) For purposes of this section—

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been

(Statutes Involved)

made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(d) Nothing in subsection (c) of this section shall be deemed to affect the applicability of subsection (a) of this section in the case of a claim where the presumptions provided for therein are inapplicable.

(Statutes Involved)

Sec. 413; 30 USC §923:

(a) Except as otherwise provided in section 414 [30 USC §924] of this title, no payment of benefits shall be made under this part except pursuant to a claim filed therefor on or before December 31, 1973, in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe.

(b) In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 423 of Title 42, but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence sholl be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 421 of Title 42 shall be applicable. The provisions of sections 404, 405(a), (b), (d), (e), (f), (g), (h), (j), (k), and (l), 406, 407, and 408 of Title 42 shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister or dependent, as if benefits under this part were benefits under subchapter II of chapter 7 of Title 42.

(c) No claim for benefits under this section shall be considered unless the claimant has also filed a claim under

the applicable State workmen's compensation law prior to or at the same time his claim was filed for benefits under this section; except that the foregoing provisions of this paragraph shall not apply in any case in which the filing of a claim under such law would clearly be futile because the period within which such a claim may be filed thereunder has expired or because pneumoconiosis is not compensable under such law, or in any other situation in which, in the opinion of the Secretary, the filing of a claim would clearly be futile.

Part C — Claims for Benefits After December 31, 1973

Sec. 421; 30 USC §931:

(a) On and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconiosis they shall be entitled to claim benefits under this part.

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Sec. 422; 30 USC §932:

(a) During any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) shall (except as otherwise provided in this subsection and except as the Secretary shall by

regulation otherwise provide), be applicable to each operator of coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

(b) During any such period each such operator shall be liable for and shall secure the payment of benefits, as provided in this section and section 423 [30 USC §933] of this title.

(c) Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 412(a) [30 USC §922(a)] of this title in accordance with the regulations of the Secretary and the Secretary of Health, Education, and Welfare applicable under this section: *Provided,* That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis which did not arise, at least in part, out of employment in a mine during the period when it was operated by such operator.

(d) Benefits payable under this section shall be paid on a monthly basis and, except as otherwise provided in this section, such payments shall be equal to the amounts specified in section 412(a) [30 USC §922(a)] of this title.

(e) No payment of benefits shall be required under this section:

(1) except pursuant to a claim filed therefor in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe;

(2) for any period prior to January 1, 1974; or

(Statutes Involved)

(3) for any period after twelve years after December 30, 1969.

(f) (1) Any claim for benefits under this section shall be filed within three years of the discovery of total disability due to pneumoconiosis or, in the case of death due to pneumoconiosis, the date of such death.

(2) Any claim for benefits under this section in the case of a living miner filed on the basis of eligibility under section 411(c)(4) [30 USC §921(c)(4)] of this title, shall be filed within three years from the date of last exposed employment in a coal mine or, in the case of death from a respiratory or pulmonary impairment for which benefits would be payable under section 411(c)(4) [30 USC §921(c)(4)] of this title, incurred as the result of employment in a coal mine, shall be filed within fifteen years from the date of last exposed employment in a coal mine.

(g) The amount of benefits payable under this section shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis.

(h) The regulations of the Secretary of Health, Education, and Welfare promulgated under section 411 [30 USC §921] of this title shall also be applicable to claims under this section. The Secretary of Labor shall by regulation establish standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines. The Secretary may also, by regulation, establish standards for apportioning liability for benefits under this subsection among more than one operator where such apportionment is appropriate.

(i) (1) During any period in which this section is applicable with respect to a coal mine an operator of such mine who, after December 30, 1969, acquired such mine or substantially all the assets thereof from a person (herein-

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after referred to in this paragraph as a "prior operator") who was an operator of such mine on or after the operative date of this subchapter shall be liable for and shall, in accordance with section 423 [30 USC §933] of this title, secure the payment of all benefits which would have been payable by the prior operator under this section with respect to miners previously employed in such mine if the acquisition had not occurred and the prior operator had continued to operate such mine.

(2) Nothing in this subsection shall relieve any prior operator of any liability under this section.

Sec. 430; 30 USC §940:

The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to this part: *Provided,* That for the purpose of determining the applicability of the presumption established by section 411(c)(4) [30 USC §921(c)(4)] of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines.